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October 18, 2011

VIA FEDERAL EXPRESS – OVERNIGHT DELIVERY

Lester A. Heltzer, Executive Secretary
Office of Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 5300
Washington, DC 20570-0001

Re: Hyundai Rotem USA Corporation and Aerotek, Inc., Joint Employers; Case 4-CA-37657

Dear Mr. Heltzer:

Enclosed please find Respondent Aerotek, Inc.'s Answering Brief to Counsel for the Acting General Counsel's Exceptions to the Administrative Law Judge's Decision in the above-captioned matter. Copies of Respondent Aerotek, Inc.'s Answering Brief have this day been e-mailed to the persons below.

Very truly yours,

Marvin L. Weinberg
Counsel for Respondent Aerotek, Inc.

MLW/lmm
Enclosures
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UNITED STATES OF AMERICA

BEFORE

THE NATIONAL LABOR RELATIONS BOARD

HYUNDAI ROTEM USA CORPORATION
AND AEROTEK, INC., JOINT EMPLOYERS

and **Case: 4-CA-37657**

TRANSPORT WORKERS UNION OF
PHILADELPHIA, LOCAL 234, AFL-CIO

AEROTEK, INC.'S ANSWERING BRIEF TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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STATEMENT OF THE CASE

On August 26, 2010, Transport Workers Union of Philadelphia, Local 234, AFL-CIO ("Union" or "Charging Party"), filed an unfair labor practice charge alleging that Aerotek, Inc. ("Aerotek" or "Respondent Aerotek") and Hyundai Rotem USA Corporation ("Hyundai" or "Respondent Hyundai") violated Section 8(a)(1) and (3) of the National Labor Relations Act (the "Act") in several respects.

The allegations that were the subject of the hearing before the Administrative Law Judge ("ALJ") were based on an amended charge in Case 4-CA-37657, alleging that Aerotek and Hyundai interfered with, restrained, and coerced employees by maintaining an illegal rule subjecting employees to discipline for discussing their compensation and benefits with other employees ("GCX1(i)"). On September 9, 2011, ALJ Clark issued his Decision ("ALJD") finding that Aerotek and Hyundai, as Joint Employers, violated Section 8(a)(1) of the Act. Specifically, the ALJ found that Respondents Aerotek and Hyundai violated the Act by the following conduct:

(a) Maintaining or enforcing a provision in its employment agreement under the heading, "Confidentiality" that contains the following language: "YOU FURTHER AGREE NOT TO DISCUSS THE COMPENSATION STATED IN THIS AGREEMENT OR THE COMPENSATION PAID TO YOU BY AEROTEK PURSUANT TO ANY PRIOR EMPLOYMENT AGREEMENT, IN ANY MANNER, WITH THE CLIENT, THE CLIENT'S EMPLOYEES, OR ANY CONTRACT EMPLOYEE OF THE CLIENT";

(b) Promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing wages, hours, benefits, and other terms and conditions of employment among themselves, with other employees or with non-employees;

(c) Threatening employees by e-mail with discharge if they discussed their wages, hours, and other terms and conditions of employment among themselves, with other employees, or with non-employees and referencing the overly broad confidentiality provision in the e-mail. (ALJD p. 10, lines 36-50 and p. 11, lines 5-11).

In the remedy section of his Decision, the ALJ ordered Respondents to rescind the confidentiality provision and notify its employees, in writing, that it had done so. He also ordered Respondents to sign and post the notice set forth in Appendix A, at its two Philadelphia locations and to distribute it electronically, if Respondents customarily communicate to their employees in that manner. Further, Aerotek was ordered to sign and mail a separate notice (Appendix B) to its current employees (numbering approximately 1100) and former employees (as of February 25, 2010) who are located in Southeastern Pennsylvania (ALJD p. 11, lines 21-51, p. 12, lines 7-13, and p. 13, lines 17-19), (TR 38).

On September, 30, 2011, Counsel for the Acting General Counsel ("CAGC") filed three substantive cross-exceptions to the ALJD. These exceptions essentially state that the ALJ erred when he limited the remedy by requiring Aerotek to mail the Notice to current and former employees just located in Southeastern Pennsylvania as opposed to all of its employees and former employees (employed during the period February 25, 2010 to the present) across the United States who worked under the confidentiality provision.

I. ANALYSIS

A. GIVEN THE ABSENCE OF ANY RECORD EVIDENCE THAT AEROTEK'S EMPLOYEES OUTSIDE OF SOUTHEASTERN PENNSYLVANIA ARE OR WERE SUBJECT TO THE CONFIDENTIALITY PROVISION, THE ALJ CORRECTLY LIMITED THE MAILING TO CURRENT AND FORMER EMPLOYEES IN SOUTHEASTERN PENNSYLVANIA

It is respectfully submitted that the ALJ's recommended remedy is correct (except for the inadvertent reference to Region 3 instead of Region 4 in his Order) based on the record evidence. In her brief, CAGC argues that the ALJ erred by not requiring Aerotek to send the Notice (designated as Appendix B in the ALJD) to all of its employees across the United States who were required to sign the confidentiality provisions. Counsel makes this bold argument despite there being no record evidence that Aerotek required its employees outside of Southeastern Pennsylvania to enter into the confidentiality provision which is at issue in this case.

CAGC acknowledges that Aerotek did not stipulate that the confidentiality language or language similar to it appears in Aerotek's employment contracts used throughout the country. Further, Michael Burke, Aerotek's Director of Business Operations in the Philadelphia market, testified that he was unaware if the confidentiality provision at issue was used in locations outside of the Greater Philadelphia area. (TR 34-36). Notwithstanding the above and the absence of any evidence to the contrary, CAGC speculates that there is a "likelihood" that Aerotek requires all of its employees to sign a contract with a confidentiality clause identical to or similar to the one found unlawful in the subject case. CAGC cavalierly maintains that if Aerotek has not used this type of confidentiality clause elsewhere, requiring it to send the Board's Notice will not present a burden. Of course, this completely ignores the substantial time and expense that Aerotek

would spend having to first identify current and former employees who are or were subject to the confidentiality provision at issue and then having to mail the Notice to these employees and former employees. CAGC seems to forget or ignores the fact that Aerotek currently has 1100 employees in Southeastern Pennsylvania alone. (TR 38).

Under Board law, CAGC's argument is terribly flawed for at least several reasons. First, it is well settled that a Board remedy cannot be imposed based on pure speculation. See e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 901 (1984). Clearly, as set forth above, there is not a shred of evidence that Aerotek uses the subject confidentiality clause outside of Southeastern Pennsylvania. The ALJ recognized this when based on the "evidence", he recommended that the notice mailing be limited to Aerotek's current and former employees in Southeastern Pennsylvania. (ALJD p. 12, lines 9-13).

Second, requiring Aerotek to plow through personnel files in its offices across the country to determine who is or was subject to the confidentiality clause and then notifying those current and former employees is the type of punitive remedy which the Board does not endorse. See e.g., Carpenters Local 60 v. NLRB, 365 U.S. 651, 655 (1961), cited in Iron Workers Local 377 and Ronald W. Bryant (Alamillo Steel Corp.), 326 NLRB 375, 159 LRRM 1097, 1098 (1998), holding that Section 10(c) of the Act is to be remedial not punitive. There is no provision in the Act for punitive remedies; instead, the Board's remedies are limited to effecting a restoration of the situation, as nearly as possible, to that which would have obtained but for illegal discrimination. New England Tank Industries, 147 NLRB 598, 599 [56 LRRM 1253] (1964) (quoting Phelps Dodge v. NLRB, 313 U.S. 177 at 194 (1941).

Third, CAGC's proposed remedy parallels those instances where the Board has expanded its remedial powers beyond the actual locations at which the unfair labor

practices were committed in order to offset the effects caused by the unlawful conduct. For example, the Board will order a corporate-wide remedy where there is a general pattern of anti-union hostility and discriminatory conduct. United Aircraft Corporation v. National Labor Relations Board, 440 F.2d. 85, 76 L.R.R.M. 2761 (2nd Cir. 1971). Also, a corporate-wide order has been held to be properly remedial where either the evidence supports an inference that the employer will commit further unlawful acts at a substantial number of other sites or the record shows that employees at other sites are aware of the unfair labor practices and may be deterred by them from engaging in protected activities (underline added). See NLRB v. S.E. Nichols, Inc., 862 Fd. 2nd 952, 960-61 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1108, 109 S.Ct. 3162, 104 L.Ed. 2nd 1025 (1989). Again, there is nothing in this record to support the extraordinary remedy which CAGC seeks in this case.

CAGC cites Northeastern Land Services, Ltd. d/b/a the NLS Group, 352 NLRB 744 (2008), in an effort to bolster her argument that an expanded remedy is appropriate. It should be noted that in NLS, unlike our case, there was a stipulation that the employment contracts for all right-of-way agents contained the same or similar language which was found to be unlawful. While the Board required respondent to send the notice to right-of-way agents and other employees, there is no indication in the decision as to the number or locations of non right-of-way employees employed by respondent. Finally, NLS can also be distinguished because there respondent discharged an employee pursuant to the overbroad confidentiality rule. Aerotek did not discipline any employees pursuant to its rule, another reason why an extraordinary remedy is not warranted.

II. CONCLUSION

For all of the above stated reasons, Respondent Aerotek respectfully requests that the Board dismiss Counsel for the Acting General Counsel's exceptions to the ALJD and affirm the ALJ's recommended remedy.

Respectfully submitted,

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Dated: 10/18/11

CERTIFICATE OF SERVICE

I, Marvin L. Weinberg, hereby certify that on this day I sent via Federal Express, overnight mail and e-mail, Aerotek, Inc.'s Answering Brief to Counsel for the Acting General Counsel's Exceptions to the Administrative Law Judge's Decision to the following individuals:

(Original and 8 Copies)
via Federal Express

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